'later evidence', as he put it, and went on to hold that this claim of the respondent ('believed to be in the region of $4,500,000') 'has now *prima facie* been supported in exhibit LSY-35'. We regret we find in this conclusion a grave error and serious misconception and cannot but be in a state of nescience as to how an undated and unsigned document with no mention of the amount of the purported claim by the respondent can be considered as evidence in support of a pleading in that respect which we think we have sufficiently described earlier as one which in regard to substance and form cannot even withstand the test of casual curial scrutiny. We would *en passant* observe that a *Mareva* application must necessarily in respect of the claim on which it is premised relate to the pleading of the plaintiff in the action instituted and even if it is sought to remedy the position by affidavit, it would make no difference as any defect or omission in a statement of claim cannot be made good by affidavit evidence: *Gold Ores Reduction Co.* v. *Parr*[9] where Mathew, J., said that "it is most important that a defendant should know from the writ what the exact claim against him is"; this case was followed and applied by this court in *United Malayan Banking Corporation Berhad* v. *Palm & Vegetable Oils (M) Sdn. Bhd. & Ors.*[10]

We accordingly in the circumstances for the reasons we have given find that there is no justification whatsoever for any protection by way of a *Mareva* order for the respondent in respect of its purported claim for 'damages and/or additional costs' believed to be in the region of $4,500,000'. We find that this is indeed a case where we can on this aspect of the matter interfere with the judge's exercise of his discretion in regard to the order he made on January 26, 1984. Indeed when in the course of hearing argument we put the several matters we have adumbrated to counsel for the respondent he had perforce to agree that he cannot rely on the document marked 'LSY-35' which purports to be a report of some sort but which is undated and unsigned and had to concede that he cannot accordingly sustain the learned Judge's order as to the purported claim for $4,500,000, and now asks the court to vary the order by limiting it to the amount claimed as due and payable by the appellant in the sum of $2,025,822.40.

In the event at the conclusion of argument we allowed the appeal with costs and varied the order of January 26, 1984 made by the learned Judge by the insertion of the words 'to the extent of $2,025,822.40' in respect of the moneys held to the account of the appellant by the Board under the main contracts. We also directed that the deposit lodged in court by way of security be refunded to the appellant.

Appeal allowed.

Solicitors: *Rashid & Lee; Adnan, Sundra & Low.*

PUBLIC PROSECUTOR v. OON LAI HIN

[F.C. (Seah, Mohamed Azmi & Syed Agil Barakbah F.JJ.) September 17, 1984]

[Kuala Lumpur – Federal Court Criminal Appeal No. 29 of 1984]

Criminal Law and Procedure – Charge of trafficking in dangerous drugs – Sentence – Dangerous Drugs Act, 1952, ss. 34 & 39B(2).

Dangerous Drugs – Trafficking – Grounds for sentencing – Dangerous Drugs Act, 1952, ss. 34 & 39B(2).

In this case the respondent had pleaded guilty to the charge of trafficking in dangerous drugs, that is morphine. The learned trial Judge in the exercise of his discretion sentenced him to a term of life imprisonment and fourteen strokes of whipping. The learned trial judge appeared to have been influenced by two main factors viz. (1) that in all the previous appeals when sentence of death was substituted for life imprisonment and whipping, the dangerous drug involved was heroin and not morphine; (2) the inordinate delay in bringing the case to trial after the arrest of the respondent. The Public Prosecutor appealed against the inadequacy of the sentence.

Held: (1) it makes no difference whether it was heroin or morphine. As long as the accused person was found guilty of trafficking in dangerous drugs in substantial quantity, the death sentence should be passed;

(2) the fact that the respondent had pleaded guilty to the charge and was a first offender is also not a valid reason for not imposing the death penalty if he was convicted of trafficking dangerous drugs in large quantity;

(3) the two factors considered by the learned trial judge do not constitute exceptional circumstances and are therefore irrelevant.

Cases referred to:–

(1) *Public Prosecutor* v. *Loh Hock Seng* [1980] 2 M.L.J. 13.
(2) *Public Prosecutor* v. *Oo Leng Swee* [1981] 1 M.L.J. 247.
(3) *Public Prosecutor* v. *Chang Liang Sang* [1982] 2 M.L.J. 231.
(4) *Public Prosecutor* v. *Tan Hock Hai* [1983] 1 M.L.J. 163.

FEDERAL COURT.

Tee Hong Geok (Deputy Public Prosecutor) for the Public Prosecutor.
W. P. Leong for the respondent.

Cur. Adv. Vult.

Seah F.J. (delivering the Judgment of the Court): The charge against the respondent, Oon Lai Hin and 2 others reads as follows:

"That you, Oon Lai Hin, I/C 2528220, Ooi Eok Chin I/C 4285604 and Chny Bian Neo I/C 2267134 on 30th June, 1981 at about 3.20 p.m. at Jalan Duku, Off Jalan Telok Gadong, in the district of Kelang, in the State of Selangor, in furtherance of the common intention of all, did traffic in dangerous drugs on your own behalf to wit 1104 grams of Morphine as listed under the 1st Schedule of Dangerous Drugs Act 1952 and you thereby committed an offence under Section 39B(1) of the Dangerous Drugs Act 1952 read together with S.34 of the Penal Code and punishable under Section 39B(2) of the said Act."

On July 10, 1984 the respondent, Oon Lai Hin pleaded guilty to the charge whereas the other 2 co-accused claimed trial. The learned trial judge accepted the plea of the respondent and in the exercise of his discretion sentenced him to a term of life imprisonment and fourteen strokes of whipping. After sentence had been passed the learned Deputy Public Prosecutor withdrew the charge against the 2 accused persons and the Court ordered that they be discharged and acquitted.

This is an appeal by the Public Prosecutor against the inadequacy of sentence. It is submitted by the learned Deputy Public Prosecutor that the learned trial judge should have imposed the death penalty instead of imprisonment for life and fourteen strokes of whipping.

It is conceded by the learned Deputy Public Prosecutor that this charge was governed by the old law which gave the Court a discretion either to impose the death penalty or life imprisonment plus whipping. However, it is argued that having regard to the large amount of morphine involved and the trenchant observations of the Federal Court in

(1) *Loh Hock Seng*,[1]
(2) *Oo Leng Swee*,[2]
(3) *Chang Liang Sang*,[3] and
(4) *Tan Hock Hai*,[4]

the learned trial judge should have passed the death penalty.

It seems to us that in adopting the more lenient punishment the learned trial judge appears to have been influenced by 2 main factors, viz:

(a) that in all the previous appeals when sentence of death was substituted for life imprisonment and whipping by the Federal Court, the dangerous drug involved was heroin and not morphine; and

(b) inordinate delay in bringing the case to trial after the respondent was arrested and charged on June 30, 1981.

In *Chang Liang Sang* case *(supra)* Raja Azlan Shah C.J. (Malaya) (as he then was) said:

"Other than in the most exceptional circumstances, a sentence of death should be imposed following a conviction for trafficking, in order to mark the gravity of the offence, to emphasize public disapproval, to serve as a warning to others, to punish the offenders and most of all to protect the public."

It makes no difference, in our opinion, whether it was heroin or morphine, as long as the accused person was found guilty of trafficking in dangerous drugs in substantial quantity, the death sentence should be passed. *A fortiori,* the fact that the respondent had pleaded guilty to the charge and was a first offender is also not valid reason for not imposing the death penalty if he was convicted of trafficking dangerous drugs in large quantity [see *Oo Leng Swee (supra)*]. In our judgment, the two factors taken by the learned trial judge do not constitute exceptional circumstances and are therefore irrelevant.

Since the respondent was convicted of trafficking in 1104 grams of morphine, we allow the Public Prosecutor's appeal against sentence. We accordingly set aside the term of imprisonment for life and whipping imposed on the respondent and substitute therefore the sentence of death.

Appeal allowed.

Solicitors: *W.P. Leong & Partners.*